Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOSEPH JAMES BURKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

J. Craig Williams
Counsel for Petitioner
Florida Bar No. 0166091
211 Liberty Street, Suite 1
Jacksonville, Florida 32202
(904) 353-3631 / Fax (904) 356-8459

6488

QUESTION PRESENTED

1. Whether clarifying amendment 347 to U.S.S.G. §3C1.1 should be applied retroactively to the petitioner's sentence pursuant to a motion filed under 28 U.S.C. §2255.

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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No.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, **JOSEPH JAMES BURKE,** respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals

for the Eleventh Circuit, entered in the above entitled proceeding on September 3, 1998.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to this petition and is published at 152 F.3d 1329. The opinion of the district court is unpublished and appears at Appendix C.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on September 3, 1998, and issued as mandate on October 28, 1998. See Appendix A, B. The jurisdiction of this Court to review the opinion of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. U.S.S.G. §3C1.1 (1988) provides, in pertinent part, that:

> If the defendant willfully impeded or obstructed, or attempted to impede or obstruct, the administration of justice during the investigation or prosecution of the instant offense, increase the offense level [from Chapter 2] by 2 levels.

3. Amendment No. 347 to U.S.S.G. §3C1.1, effective November 1, 1990, provides that:

> 4. The following is a non-exhaustive list of examples of the types of conduct that, absent a separate count of conviction for such conduct, do not warrant application of this

enhancement, but ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range:

(a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

. . .

(d) avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight)).

4. 28 U.S.C. §2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

A. The Facts Material to the Questions Presented.

Mr. Joseph James Burke was arrested June 9, 1988 and was initially charged by indictment with two counts of armed bank robbery. The indictment was subsequently superseded by an information filed by the United States Attorney's Office on August 15, 1988. At that time Mr. Burke was charged with six counts of armed bank robbery, in violation of 18 U.S.C. 2113(a)(d). On August 16, 1988, the Appellant pled guilty to the six counts of armed bank robbery. Counts two and six took place after November 1, 1987, therefore, the Sentencing Reform Act of 1984 was applicable to those counts. Counts one, three, four, and five were subject to statutory provisions which predated the sentencing guidelines. Mr. Burke's sentence was then deferred to October 28, 1988 and a presentence investigation was ordered by the court.

United States Probation Officer Raymond Owens prepared the presentence investigation and calculated the offense level under the sentencing guidelines for Counts two and six as a level twenty-four. Mr. Burke was given a two-level adjustment for obstruction of justice which was incorporated in the calculating of the offense level. According to the presentence investigation, this two-level adjustment for obstruction of justice was pursuant to section §3C1.1, and was based upon the contention that Mr. Burke remained a fugitive from justice from October 28, 1987 until his capture by the FBI on June 9, 1988 in Maple Grove, Minnesota, even though he was aware that the FBI was pursuing him, and provided false identification upon his arrest.

Based upon the calculations of the probation officer, pursuant to the sentencing guidelines, Mr. Burke was given a total offense level of twenty-four, and a criminal history

category of I, which placed him in a sentencing range of fifty-one to sixty-three months.

Subsequently, Mr. Burke was sentenced to a prison term of five years three months on counts two and six, the counts which offenses occurred after implementation of the guidelines, and to twenty-five years on the remaining four counts, consecutive to counts two and six.

On April 18, 1997, Mr. Burke filed a motion for modification and correction of sentence, pursuant to 28 U.S.C. §2255, based upon a November 1, 1990 clarifying amendment, no. 347, to the sentencing guidelines which states that post-offense flight and giving a false name do not constitute obstruction of justice. Mr. Burke's sentencing guideline level, applying the November 1, 1990 amendment, would have been a level 22 with a sentencing range of 41-51 months.

On May 6, 1997, the Honorable Howell Melton, United States District Judge, issued an order to show cause, ordering a response to Mr. Burke's aforementioned motion from the government. On May 27, 1997, the United States Attorney's Office filed its Response in Opposition to Defendant's Motion for Modification of Sentence.

On August 15, 1997, the district court denied Mr. Burke's Motion for Modification and Correction of Sentence, and subsequently, Mr. Burke filed a motion requesting the district court to issue a Certificate of Appealability. On September 25, 1997, the court denied that request. Mr. Burke then filed a Motion for Issuance of Certificate of Appealability with the United States Court of Appeals for the Eleventh Circuit, which was granted on this issue on November 25, 1997. On September 3, 1998, Mr. Burke's appeal was denied by an order entered by the United States

Court of Appeals for the Eleventh Circuit. The appellate court in it's opinion stated:

> [i]nsofar as amendment 347 is a clarifying amendment effecting no change in the substantive law, Burke was afforded the opportunity to raise the impropriety of the obstruction-of-judgment enhancement at his original sentencing and on direct appeal. Considering all of the circumstances, we cannot say that the alleged mis-application of the sentencing guidelines in this case was fundamentally unfair or that it constituted a miscarriage of justice sufficient to form the basis for collateral relief.

The appellate court held:

> ... that a claim that the sentence imposed is contrary to a post-sentencing clarifying amendment is a non-constitutional issue that does not provide a basis for collateral relief in the absence of a complete miscarriage of justice.

B. <u>The Basis for Jurisdiction Below</u>.

Jurisdiction in the United States District Court for the Middle District of Florida was invoked pursuant to 28 U.S.C. §2255.

REASONS FOR GRANTING THE PETITION

1. The decision of the Court of Appeals contravenes the opinion of the United States Court of Appeals for the First Circuit which held that the clarifying amendment to U.S.S.G. §3C1.1 was not substantive and should apply retroactively. Isabel v. United States, 980 F.2d 60 (1st Cir. 1992), Appendix D. The Amendment to U.S.S.G. §3C1.1 clearly states that petitioner's conduct in avoiding arrest and in providing a false name at the time of his arrest was not enough to trigger the two level enhancement pursuant to U.S.S.G. §3C1.1. The circuits are clear that U.S.S.G. §3C1.1 (1988) should not have applied to the facts below, but there is conflict as to whether or not the clarifying amendment should be applied retroactively. See United States v. Alpert, 28 F.3d 1104 (11th Cir 1994)(avoiding or fleeing from arrest foes not warrant an enhancement); United States v. Shores, 966 F.2d 1383 (11th

Cir. 1992)(sentence should not have been enhanced based upon initially providing a false name); United States v. Stites, 56 F.3d 1020 (9th Cir. 1995); United States v. Sanchez, 928 F.2d 1450 (6th Cir. 1991).

The clarifying amendment to U.S.S.G. §3C1.1 was not available at the time of the petitioner's sentencing. The First Circuit Court of Appeals noted in Isabel, supra:

> It is true that a sentencing court applies the law in effect at the date of sentencing. Nevertheless, in interpreting an applicable guideline virtually all circuits have found or stated that it is appropriate to consider post-sentencing amendments that clarify but do not substantively change the guideline. Among numerous cases to this effect are United States v. Perdomo, 927 F.2d 111, 116-17 (2d Cir. 1991), United States v. Howard, 923 F.2d 1500, 1504 & n. 4 (11th Cir. 1991), and United States v. Caballero, 936 F.2d 1292, 1299 n. 8 (D.C. Cir. 1991), cert. denied, — U.S. —, 112 S.Ct. 943, 117 L.Ed.2d 113 (1992), but many more could be cited.

In addition, that court cited to United States v. Fiala, 929 F.2d 285 (7th Cir. 1991), for the proposition that the 1990

amendment to the section 3C1.1 commentary was a clarifying amendment and should be applied to a defendant who was sentenced before the amendment. This is a recurring issue as the sentencing guidelines are subject to being amended and subsequently clarified after a defendant has been sentenced. Likewise, this is an important issue which should be settled by this Court as it encompasses due process issues and concerns, in that defendants are being improperly sentenced to greater amounts of prison time.

2. The decision of the Court of Appeals contravenes Isabel, supra, in which a similar §2255 motion was filed by the appellant, arguing that U.S.S.G. §3C1.1 was improperly applied. There, in footnote number two, the court rejected the government's claim that the appellant had waived the issue by not raising it on direct appeal. There, the court stated that since the clarifying amendment had not become effective until after the appellant had been sentenced

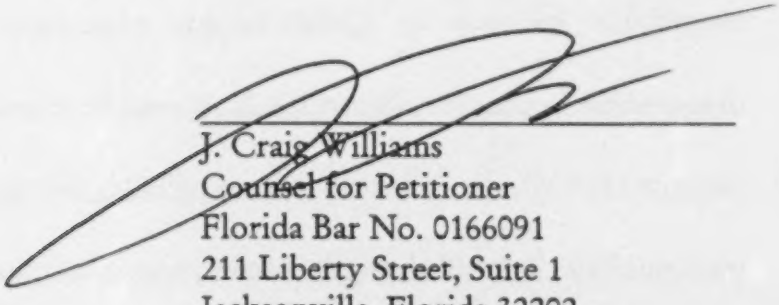
and his appeal had been docketed and briefed, that "he could not readily have raised that issue on appeal." Isabel, supra, at 61; see also United States v. Essig, 10 F.3d 968 (3d Cir. 1993); Fields v. United States, 963 F.2d 105 (6th Cir. 1992); United States v. Wilson, 997 F.2d 429 (8th Cir. 1993); United States v. Allen, 16 F.3d 377 (10th Cir. 1994); United States v. Norman, 3 F.3d 368 (11th Cir. 1993); see also United States v. Schlesinger, 49 F.3d 483 (9th Cir. 1994)(certain errors are remediable -by way of §2255 because they were not discoverable in time for direct appeal). Here, the amendment did not take effect until November 1, 1990, well after the petitioner was sentenced. Additionally, manifest injustice is inherent in a sentencing guidelines error in that a person's liberty is at issue. Therefore, the relief sought was properly filed pursuant to 28 U.S.C. §2255 and should have been granted.

This is an important and recurring issue in that defendants must be able to address due process issues which were not discoverable prior to direct appeal and which arise subsequent to the appeal being docketed and briefed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



J. Craig Williams
Counsel for Petitioner
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Counsel for Petitioner
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(904) 353-3631 / Fax (904) 356-8459

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-3013

D.C. Docket Nos. 87-211-Cr-J-12 & 97-409-Civ-J-10

JOSEPH JAMES BURKE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(September 3, 1998)

Before TJOFLAT, COX and HULL, Circuit Judges.

COX, Circuit Judge:

Joseph James Burke appeals the district court's denial of his 28 U.S.C. § 2255 motion for modification and correction of sentence. We affirm.

BACKGROUND

Burke pleaded guilty to six counts of armed bank robbery in violation of 18 U.S.C. § 2113(a)(d). Two of the six robberies took place after the effective date of the sentencing guidelines; Burke was therefore sentenced under the guidelines under those counts. The guideline sentences included a two-level enhancement for obstruction of justice based on evidence that Burke remained a fugitive from justice until his capture by the FBI, even though he knew the FBI was pursuing him, and that he provided false identification when apprehended. Burke made no objections at sentencing regarding the obstruction-of-justice enhancement. Burke subsequently filed a notice of appeal from his conviction and

sentence, but the appeal was dismissed pursuant to Burke's motion for voluntary dismissal.

In 1990, two years after Burke was sentenced, the Sentencing Commission added amendment 347 to the obstruction-of-justice enhancement provision, stating that post-offense flight and giving a false name ordinarily does not constitute obstruction of justice. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, comment. (n.4(a), (d)). The Sentencing Commission explicitly classified amendment 347 as a clarifying amendment. *See* U.S.S.G. App. C (amendment 347). Burke subsequently moved pursuant to 28 U.S.C. § 2255 for a modification and correction of his sentence based on this amendment. In the Government's response to Burke's motion, the Government argued, among other things, that Burke's claim is not cognizable on collateral review because it is neither constitutional nor jurisdictional and does not constitute a fundamental defect

resulting in a complete miscarriage of justice. The district court denied relief "for the reasons stated in the government's response." (R.1-62, at 2).

CONTENTIONS OF THE PARTIES

The Government contends that Burke's claim that his sentence is contrary to a subsequently enacted clarifying amendment is a non-constitutional claim that does not provide a basis for collateral relief. Burke maintains that his claim is cognizable on collateral review and further maintains that he has made the requisite showing of cause for failure to object at sentencing and raise the issue on direct appeal, and actual prejudice resulting from the error. Burke relies on the fact that amendment 347 is a clarifying amendment to support his argument that the amendment should apply retroactively to him. However, somewhat inconsistently, to establish cause for his failure to raise the claim on direct appeal, Burke argues in his reply brief that because

amendment 347 was added two years after his sentencing, the "change in the law effected by the commentary . . . was not discoverable nor would it have been discoverable within the time frame of the direct appeal." Reply Brief at 9. Burke claims actual prejudice in the fact that the improper application of the obstruction-of-justice enhancement increased his sentence.

DICUSSION

The threshold inquiry is whether Burke's claim that his sentence is contrary to a subsequently enacted clarifying amendment is cognizable under § 2255. The Supreme Court has noted that § 2255 is not a substitute for direct appeal. *See Sunal v. Large*, 332 U.S. 174, 178, 67 S.Ct. 1588, 1590, 91 L.Ed. 1982 (1947). Thus, nonconstitutional claims can be raised on collateral review only when the alleged error constitutes a "fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent

with the rudimentary demands of fair procedure." *Reed v. Farley*, 512 U.S. 339, 348, 114 S.Ct. 2291, 2297, 129 L.Ed.2d 277 (1994) (quoting *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962)) (alteration in original).

At least one of our sister circuits has explicitly held that a claim that the sentence imposed is contrary to a subsequently enacted clarifying amendment is a non-constitutional issue that does not provide a basis for collateral relief in the absence of a complete miscarriage of justice. *See, e.g., Grant v. United States*, 72 F.3d 503, 506 (6th Cir.), *cert. denied*, 517 U.S. 1200, 116 S.Ct. 1701 (1996); *see also United States v. Payne*, 99 F.3d 1273, 1281-82 (5th Cir. 1996) (holding that a district court's technical application of the guidelines is a non-constitutional issue that is not cognizable on collateral review absent a complete miscarriage of justice); *Graziano v. United States*, 83 F.3d 587, 589-90 (2d Cir. 1996) (holding that absent a complete miscarriage of justice, challenges to the

application of the guidelines will not be considered on collateral review where the defendant failed to raise them on direct appeal); *Auman v. United States*, 67 F.3d 157, 161 (8th Cir. 1995) (holding that ordinary questions of guideline interpretation falling short of a miscarriage of justice do not present a proper § 2255 claim); *United States v. Schlesinger*, 49 F.3d 483, 485-86 (9th Cir. 1994) (concluding that nonconstitutional sentencing errors that have not been raised on direct appeal generally may not be reviewed under § 2255 with the possible exception of errors not discoverable in time for direct appeal); *United States v. Faubion*, 19 F.3d 226, 232-33 (5th Cir. 1994) (holding that attack on the district court's upward departure from the guidelines is not cognizable in a § 2255 action absent a miscarriage of justice); *Scott v. United States*, 997 F.2d 340, 342-43 (7th Cir. 1993) (stating that petitioner could not raise, by means of § 2255, an allegation that the district court misapplied the sentencing guidelines

where the sentence had become final, petitioner had not appealed, and the petitioner failed to demonstrate any extraordinary circumstances warranting collateral attack on his sentence).

In the instant case, Burke's claim falls short of indicating a "complete miscarriage of justice." This court has held that amendment 347 is a clarifying rather than a substantive amendment. *See United States v. Howard*, 923 F.2d 1500, 1504 (11th Cir. 1991); *see also* U.S.S.G. App. C (amendment 347) ("[t]his amendment clarifies the operation of § 3C1.1."). Clarifying amendments do not effect a substantive change, but provide persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline. *See Howard*, 923 F.2d at 1504 n.4 (citation omitted). Insofar as amendment 347 is a clarifying amendment effecting no change in the substantive law, Burke was afforded the opportunity to raise the impropriety of the

obstruction-of-justice enhancement at his original sentencing and on direct appeal. Considering all of the circumstances, we cannot say that the alleged mis-application of the sentencing guidelines in this case was fundamentally unfair or that it constituted a miscarriage of justice sufficient to form the basis for collateral relief. *See Grant*, 72 F.3d at 506.

We thus hold that a claim that the sentence imposed is contrary to a post-sentencing clarifying amendment is a non-constitutional issue that does not provide a basis for collateral relief in the absence of a complete miscarriage of justice. We do not reach the issue of whether Burke made the requisite showing of cause and prejudice to excuse his procedural default in failing to raise the issue at sentencing and on direct appeal.[1]

---

[1] We have in the past opted to address the issues of procedural default, cause, and prejudice rather than determine whether a sentencing guidelines claim would be cognizable at all on collateral review. *See Montemoino v. United States*, 68

AFFIRMED.

F.3d 416, 417 (11th Cir. 1995). Burke did not allege or assert cause and prejudice before the district court and raised it for the first time in his reply brief to this court; we therefore prefer to rest the decision on the present grounds.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-3013

District Court Nos. 87-211-Cr
and 97-409-Civ

JOSEPH JAMES BURKE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before TJOFLAT, COX and HULL, Circuit Judges.

JUDGMENT

This cause came to e heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED.

Entered: September 3, 1998
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: Oct. 28, 1998

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs.

Case No. 87-211-Cr-J-12
97-409-Civ-J-10

JOSEPH JAMES BURKE

ORDER

The defendant filed a motion for modification of sentence pursuant to 18 U.S.C. § 3582(c)(2) (Doc.43) on April 18, 1997. On that same date, the defendant filed a motion for post-conviction relief, pursuant to 28 U.S.C. § 2255 (Doc.45). On June 27, 1997, the government filed its response to the defendant's motions. On July 11 and 25, 1997, the defendant filed replies to the government's response.

The Court has carefully reviewed the submissions of the parties. The defendant seeks a reduction of his sentence based upon the application of a clarifying amendment to the

sentencing guidelines which became effective after his conviction was final. He also asserts that the Court erred in imposing consecutive sentences in his case. For the reasons set forth in the government's response, the Court will deny the defendant's motions.

The Court notes that the defendant has cited two other cases in which this Court granted the relief sought by the defendant regarding application of the clarifying amendment. Whether relief in those cases was properly or improperly granted, the Court is of the opinion that the defendant is not entitled to the relief he seeks for the reasons stated in the government's response. Accordingly, it is

ORDERED AND ADJUDGED:

1. That the defendant's motion for modification of sentence (Doc.43) is denied; and

2. That the defendant's motion for post-conviction relief pursuant to 28 U.S.C. § 2255 (Doc.45) is denied.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 15th day of August, 1997.

/s/ Howell W. Melton
United States District Judge

Copies to: AUSA (Brown)
J. Craig Williams, Esq.
Law Clerk (JS)

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980 F.2d 60
(Cite as: 980 F.2d 60)

Maurice ISABEL, Petitioner, Appellant,
v.
UNITED STATES of America, Respondent, Appellee.

No. 92-1421.

United States Court of Appeals,
First Circuit.

Submitted July 8, 1992.

Decided Nov. 25, 1992.

After defendant's convictions for conspiring to file false tax documents and to launder drug trafficking proceeds were affirmed, 945 F.2d 1193, defendant moved to have sentence vacated, set aside or corrected. The United States District Court for the District of New Hampshire, Shane Devine, J., denied relief, and defendant appealed. The Court of Appeals, Boudin, Circuit Judge, held that: (1) amendment to Sentencing Guidelines' commentary pertaining to enhancement for obstruction of justice was to be treated as

clarification, rather than as substantive change, and therefore, could be applied retroactively, and (2) defendant was not deprived of effective assistance of counsel at sentencing.

Affirmed in part and remanded in part.

[1] CRIMINAL LAW k1236
110k1236

Amendment to Sentencing Guidelines' commentary pertaining to enhancement for obstruction of justice could be applied to sentence imposed prior to amendment; amendment, which made guideline inapplicable to unsworn lie to law enforcement officials that does not in fact hinder investigation, was clarification, rather than substantive change. U.S.S.G. § 3C1.1, comment. (nn. 3, 4), 18 U.S.C.A.App.

[2] CRIMINAL LAW k1236
110k1236

Although sentencing court applies law in effect at date of sentencing, it is appropriate, in interpreting applicable

guideline, to consider postsentencing amendments that clarify but do not substantively change the guideline.

[3] CRIMINAL LAW k1158(1)
110k1158(1)

Determination by fact finder that defendant received effective assistance of counsel at sentencing may be overturned only for clear error. U.S.C.A. Const.Amend. 6.

[4] CRIMINAL LAW k997.15(2)
110k997.15(2)

Burden is on defendant in postconviction proceeding to show that counsel failed to render effective assistance at sentencing. U.S.C.A. Const.Amend. 6.

[5] CRIMINAL LAW k641.13(7)
110k641.13(7)

Defendant who was convicted of conspiring to file false tax documents and conspiring to launder drug trafficking proceeds was not deprived of effective assistance of counsel at sentencing; counsel's arguments against enhancement for obstruction of justice were vigorous and

reduction for acceptance of responsibility, for which counsel did not argue, was highly unlikely. U.S.C.A. Const.Amend. 6.

*60 Maurice Isabel, on brief, pro se.

Jeffrey R. Howard, U.S. Atty., and Peter E. Papps, First Asst. U.S. Atty., Concord, N.H., on motion for summary disposition, for respondent, appellee.

Before SELYA, CYR and BOUDIN, Circuit Judges.

BOUDIN, Circuit Judge.

Appellant Maurice Isabel was convicted on April 30, 1990 of conspiring to file false tax documents and conspiring to launder drug trafficking proceeds, in violation of 18 U.S.C. §§ 371, 1956(a)(1)(B)(i). On July 23, 1990, he was sentenced to fifty-seven months' imprisonment. On appeal, his conviction was affirmed. United States v. Isabel, 945 F.2d 1193 (1st Cir.1991). Isabel then filed a motion under 28 U.S.C. § 2255 seeking to have his sentence vacated, set aside

or corrected. The district court denied relief, and Isabel filed the present appeal.

On this appeal, Isabel argues that the district court erred at sentencing by enhancing his sentence for obstruction of justice *61 and by failing to reduce his base offense level to reflect acceptance of responsibility. He also says that he received ineffective assistance of counsel at sentencing and that findings required by Fed.R.Crim.P. 32(c)(3)(D) were not made. [FN1] We affirm in part and remand in part.

> FN1. In his reply brief, Isabel makes several arguments that were not presented to the district court and which we, therefore, do not consider. See United States v. Valencia-Copete, 792 F.2d 4, 5 (1st Cir.1986); Porcaro v. United States, 784 F.2d 38, 39 (1st Cir.), cert. denied, 479 U.S. 916, 107 S.Ct. 320, 93 L.Ed.2d 293 (1986). In particular, Isabel alleges in his reply brief that his counsel failed to represent him effectively in his direct appeal, but his section 2255 motion alleged only that his counsel had been ineffective at sentencing.

I. THE OBSTRUCTION ENHANCEMENT

Isabel's primary claim on the appeal is a challenge to

an obstruction of justice enhancement that the district court made in originally sentencing him. The court enhanced his base offense level under section 3C1.1 of the Sentencing Guidelines because Isabel made false statements to investigators after his arrest. The guideline in effect at the time of sentencing reads as follows: "If the defendant willfully impeded or obstructed, or attempted to impede or obstruct, the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels." U.S.S.G. § 3C1.1 (1989). It was Isabel's position at sentencing, as now, that any false or misleading statements he made at the time of his arrest did not in fact hamper the investigation.

In his section 2255 motion, Isabel argued to the district court that an amendment to the commentary to section 3C1.1, which occurred after his sentencing, made clear that the court should not have applied the enhancement

in his case. [FN2] The version of the commentary in effect when he was sentenced did not explicitly address the question whether false or misleading statements that fail to mislead still merit the enhancement. It did, however, contain general language stating that the section 3C1.1 enhancement applied to "a defendant who engages in conduct calculated to mislead or deceive authorities ... in respect to the instant offense." U.S.S.G. § 3C1.1, comment (1989). Based on the guideline's language, the pre-sentence report recommended an enhancement for obstruction which, after a sentencing hearing, the district court found to be justified.

> FN2. Isabel was sentenced in July, 1990, and the new commentary amendment became effective on November 1, 1990. We reject the government's claim, mysteriously presented under a heading relating to "relitigat[ion] [of] an issue already decided," that Isabel waived this argument by not raising it in his direct appeal. Since the amendment did not become effective until after Isabel had been sentenced and after his direct appeal had been docketed and briefed, he could not readily have raised that issue on appeal.

Several months after Isabel was sentenced, the commentary to section 3C1.1 was amended. It now states that materially false statements to law enforcement officers "that significantly obstructed or impeded the official investigation or prosecution of the instant offense" warrant an enhancement, but other "false statements, not under oath," to law enforcement officers do not. U.S.S.G. § 3C1.1, application notes 3(g) and 4(b) (1992). We have interpreted that provision to mean precisely what it says: that an enhancement may be made for unsworn, false statements to law enforcement officers only if the government shows that the statements significantly obstructed or impeded the official investigation or prosecution of the offense. See United States v. Manning, 955 F.2d 770, 774-75 & n. 5 (1st Cir.1992). Isabel argues that his statements did not obstruct the government's investigation or prosecution, and that thus the district court erred in enhancing the base offense level used in calculating

his sentence.

[1][2] In rejecting the section 2255 motion, the district court found that Isabel's argument had no "legal merit" because the sentencing court was required to apply the law in effect at the time of sentencing. The court also stated that its findings at the time of sentencing meant that it would necessarily have enhanced Isabel's sentence *62 even under the amended commentary. We think that the district judge's original decision to enhance was entirely understandable in light of the general language of the 1989 guideline and commentary. But we conclude for the reasons stated below that the new and explicit commentary language favoring Isabel, contained in the subsequent amendment, is properly treated as a clarification rather than a substantive change. The pertinent language, as we noted at the outset, makes the guideline inapplicable to an unsworn lie to law enforcement officials that does not in fact hinder an investigation. Giving

Isabel the benefit of that clarification, we do not believe that the district court's findings to date, either at sentencing or in the section 2255 proceeding, show that the enhancement was warranted.

It is true that a sentencing court applies the law in effect at the date of sentencing. Nevertheless, in interpreting an applicable guideline virtually all circuits have found or stated that it is appropriate to consider post- sentencing amendments that clarify but do not substantively change the guideline. Among numerous cases to this effect are United States v. Perdomo, 927 F.2d 111, 116-17 (2d Cir.1991), United States v. Howard, 923 F.2d 1500, 1504 & n. 4 (11th Cir.1991), and United States v. Caballero, 936 F.2d 1292, 1299 n. 8 (D.C.Cir.1991), cert. denied, 502 U.S. 1061, 112 S.Ct. 943, 117 L.Ed.2d 113 (1992), but many more could be cited. We readily follow this uniform approach and turn to the guideline and amendment at issue in this case.

It is a close question whether the commentary amendment here in issue should be treated as a "clarification" or instead as a substantive "revision" of the guideline. These are not clear-cut categories. Where the line is to be drawn may well reflect not only language and intent but also implicit judgments as to the Sentencing Commission's function and the role of guideline commentary. In this case, the language of the guideline itself, unqualified by any contrary commentary prior to the 1990 amendment, provides an enhancement for a defendant who "attempted to impede or obstruct" an investigation. This language surely permits–even encourages–one to think that a deliberate material lie, although unsuccessful, might qualify as attempted obstruction. Indeed, a number of circuits so held prior to the 1990 amendment. See e.g., United States v. Blackman, 904 F.2d 1250, 1259 (8th Cir.1990); United States v. Irabor, 894 F.2d 554, 556 (2d Cir.1990).

Nevertheless, the Sentencing Commission regards its amended commentary on the obstruction issue as a clarification, for the Commission stated that "[t]his amendment clarifies the operation of § 3C1.1...." U.S.S.G.App. C at 166 (1992). The amended commentary does not in any sense read the term "attempted" out of the guideline, nor prevent all attempted but unsuccessful obstructions from triggering an enhancement. Rather, it modulates the guideline by excluding some actions that could literally be described as attempts (and indeed some actions that could literally be described as obstructions), presumably on the ground that they are not significant enough to warrant enhancement. [FN3] We give due weight to the Commission's view not merely as the drafter of the guideline and the amendment but as the expert entity with on-going responsibility for clarifying and amending the guidelines. [FN4]

FN3. For example, a threat to a witness qualifies for an enhancement even if unsuccessful whereas "fleeing from arrest" does not even if the flight is (temporarily) successful. See application notes 3(a), 4(d). Excluded conduct, such as an unsworn unsuccessful lie or successful flight, can still affect the choice of sentence "within the otherwise applicable guideline range." Application note 4.

FN4. The Sentencing Commission has authority to recommend that a reduction in the guideline range be made retroactive (see 28 U.S.C. §§ 994(o), (u); 18 U.S.C. § 3582(c)(2)), but we do not rely on that point here. The Sentencing Commission did not invoke that authority (compare U.S.S.G. § 1B1.10 listing specific amendments to be applied retroactively) and, in any case, its authority extends only to permitting, not compelling, the district court to give retroactive effect to an admitted substantive change. 18 U.S.C. § 3582(c)(2).

*63 One sister circuit has already held that the 1990 amendment to the section 3C1.1 commentary, insofar as it dealt with an attempt to obstruct, was a clarifying amendment and should be applied to a defendant who was sentenced before the amendment. United States v. Fiala, 929 F.2d 285, 290 (7th Cir.1991). This court, without directly ruling on the present issue (a post-amendment sentence was

involved), has described that language as "clarify[ing]" the guideline. United States v. Moreno, 947 F.2d 7, 10 (1st Cir.1991). Finally, although sentencing policy is a matter primarily for Congress and the Commission, the amendment offers a realistic and lenient solution for the defendant who blurts out false answers at the time of arrest but does not in fact hinder the inquiry. Thus, we follow Fiala and hold that the amendment applies in this case.

In its section 2255 decision, the district court concluded that Isabel's conduct would constitute an obstruction of justice even under the amended commentary, but the court's explanation seems to us to be flawed. The district court's memorandum on this point briefly referred to the government's statement at sentencing, citing to specific pages of the transcript. These pages, however, show that the prosecutor at sentencing took the view that "the success or lack of success of Mr. Isabel's lies" should not be the test, an

understandable position in light of then existing guideline language and commentary. Nor does anything in the evidence described in the prosecutor's statement show an actual obstructive effect. The facts available to us, admittedly not complete, suggest that Isabel's lies may well not have hindered the investigation.

Under these circumstances, we think the issue of enhancement for obstruction of justice needs to be remanded to the district court for a new determination under the clarified guideline. If the government can show that Isabel's statements significantly obstructed the inquiry, the enhancement will stand; otherwise, resentencing will be required based on a reduced offense level. On remand, assuming the government believes that it can make the obstruction showing that Manning requires, the procedural course to follow is a matter for the district court to decide in the first instance.

II. ACCEPTANCE OF RESPONSIBILITY

In his second claim of error, Isabel argues that the district court should have reduced his base offense level by two points for acceptance of responsibility under section 3E1.1 of the guidelines. As already noted, at his original sentencing Isabel was found to have obstructed justice. He claims that under guideline commentary in effect then and now, the determination of obstruction precluded the court from granting him any reduction for acceptance of responsibility. See U.S.S.G. § 3E1.1, application note 4 (1989) (obstruction finding precludes acceptance finding except in "extraordinary" case); id. (1992) (same). Because the district court reaffirmed the obstruction finding in deciding the present section 2255 motion, the court had no occasion to revisit the question whether, absent the obstruction finding, a reduction might be warranted for acceptance of responsibility.

The government claims that Isabel waived this acceptance of responsibility claim by not raising it on direct appeal and that, in order to raise the issue now, he must show cause and prejudice under the Frady standard. United States v. Frady, 456 U.S. 152, 168, 102 S.Ct. 1584, 1594, 71 L.Ed.2d 816 (1982). In the draft pre-sentence report, the probation officer apparently recommended against an adjustment for acceptance of responsibility. Isabel's counsel sought an adjustment of the wording in the report on the acceptance issue, but he did not challenge the denial outright. The probation officer then revised the report language but continued to recommend a denial of any adjustment on the ground that Isabel had admitted to tax evasion but denied involvement in money laundering, thereby failing to accept full responsibility for "his criminal conduct" under U.S.S.G. § 3E1.1(a) (1989). At sentencing, Isabel's counsel did not pursue the matter.

*64 This sequence suggests that defense counsel had concluded that the acceptance of responsibility claim could not succeed "on the merits," independent of any bar presented by an obstruction finding. As we explain below, the failure to raise the issue was certainly not ineffective assistance of counsel. Assuming that counsel had deliberately abandoned the claim because he thought it hopeless on the merits, this would ordinarily constitute a waiver, and prevent its resurrection in a section 2255 proceeding. Clauson v. Smith, 823 F.2d 660, 666 (1st Cir.1987).

What gives us pause is the district court's suggestion, in ruling on the section 2255 motion, that Isabel's counsel may not have pursued the acceptance issue precisely because counsel believed–in the district court's words–that "having lost the battle over the issue of obstruction of justice, he [counsel] could not possibly win the war with respect to acceptance of responsibility." If counsel did not pursue the

acceptance issue because the obstruction finding made him believe that pursuit to be hopeless, then we think that sufficient "cause" would exist for not raising the issue at sentencing. Cf. United States v. Di Bernardo, 880 F.2d 1216, 1227 (11th Cir.1989). There is arguably prejudice as well since, if he succeeded on both the obstruction and enhancement issues, Isabel's sentencing range would be reduced.

Under these circumstances, we believe that the just and proper course is a contingent remand on the acceptance of responsibility issue. If the district court finds that obstruction is established even under the clarified guideline, that will dispose of any ground for reexamining the acceptance of responsibility issue. Should the court instead find that obstruction is not proved, then we believe the district court should determine whether the acceptance of responsibility claim was waived and, if it was not, then it

should determine that claim on the merits. The probation officer may have been entirely correct in urging, without reference to the obstruction issue, a denial of any adjustment for acceptance of responsibility. [FN5] But we prefer this evaluation to be made by a court familiar with the trial record and the defendant, especially given the "great deference" accorded to the trial judge in appraising acceptance of responsibility. U.S.S.G. § 3E1.1, application note 5 (1989 and 1992).

> FN5. It goes almost without saying that, if the court agrees with the probation officer on the merits, then the waiver issue need not be resolved.

III. THE INEFFECTIVE ASSISTANCE CLAIM

[3][4][5] Isabel's third argument on appeal is a challenge to the district court's determination that he had received effective assistance of counsel at sentencing. Such a determination by the fact-finder may be overturned only for clear error. McCarthy v. United States, 764 F.2d 28, 30 (1st

Cir.1985). The burden is on Isabel to show that counsel failed to render effective assistance. See Panzardi-Alvarez v. United States, 879 F.2d 975, 983 (1st Cir.1989) (citing Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)), cert. denied, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1045 (1990). We have reviewed the record carefully, and have not found any clear error in the district court's determination.

Counsel's arguments on the obstruction of justice issue at sentencing were vigorous, as his defense of the entire case appears to have been. He obtained the dismissal of three counts of the indictment after opening statements were made, and the jury acquitted Isabel of other counts. Counsel also filed several motions challenging the jury's verdict. Although the court ultimately denied those motions, it noted that "[t]he instant cases were well tried and hard fought." Furthermore, after hearing counsel's argument on the obstruction of justice

issue at sentencing, the court enhanced Isabel's offense level for obstruction of justice but acknowledged that it had been a "close question." In a post-sentence memorandum, the court said that Isabel's *65 counsel had argued "ably and earnestly" for a downward departure.

In this court, Isabel points to his counsel's failure to object at sentencing to a "possible erroneous enhancement" of three points under section 2S1.1(b)(2) of the guidelines or argue for a "possible reduction" of two to four points under section 3B1.2. The evidence submitted at trial showed that Isabel knew that the funds he laundered came from unlawful dealing in narcotics. United States v. Isabel, 945 F.2d at 1196, 1202. Consequently, we do not see how counsel could reasonably have argued that Isabel should not have received a three-point increase under section 2S1.1(b)(1) (the subsection to which Isabel apparently means to refer), which requires the increase where the defendant knows the

laundered funds were the proceeds of narcotics trafficking. U.S.S.G. § 2S1.1(b)(1) (1989 and 1992).

Likewise, it would have made no sense for counsel to argue that Isabel was a minor or minimal participant in the conspiracy to launder drug money and file false tax returns, meriting a base offense level reduction under section 3B1.2. Isabel was a direct and essential party to that conspiracy. The recitation of evidence in our prior decision amply bears out that point, 945 F.2d at 1195-96, and we need not repeat the facts. It is beside the point that Isabel played no role in the narcotics trafficking. The "offense" for which he was sentenced concerned only the laundering and tax reporting scheme, and in that scheme his "role" was that of a central player. U.S.S.G. § 3B1.2 (1989 and 1992). See United States v. Richardson, 925 F.2d 112, 115 (5th Cir.), cert. denied, 501 U.S. 1237, 111 S.Ct. 2868, 115 L.Ed.2d 1034 (1991).

Finally, although counsel did not argue for an

acceptance of responsibility reduction, any such argument had little chance of succeeding. As the district court noted, Isabel was found to have obstructed justice. For that reason, a reduction for acceptance of responsibility was highly unlikely. See U.S.S.G. § 3E1.1, application note 4 ("[c]onduct resulting in an enhancement under § 3C1.1 ... ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct" and adjustments under both sections should be made only in "extraordinary cases"); United States v. Aymelek, 926 F.2d 64, 69 (1st Cir.1991) (the defendant who obstructs justice "will thereby effectively forfeit a credit for acceptance of responsibility" under the guidelines); United States v. Mata-Grullon, 887 F.2d 23, 24 (1st Cir.1989) (defendant's falsehoods "militate against" a reduction for acceptance of responsibility).

Isabel suggests that an adjustment in his case was nevertheless warranted under U.S.S.G. § 3E1.1, application

note 2 (1992). That note says that a defendant who goes to trial instead of pleading guilty is ordinarily not accepting responsibility but, as a supposedly "rare" exception, the note cites the case of a defendant who goes to trial to challenge the legal applicability of a statute to his conduct. Isabel asserts that he did admit to his actual conduct and denied only that it constituted money laundering under the relevant statute. If so, this circumstance might avoid the effect of the not-guilty plea as a bar to the reduction, but it does nothing to remove the bar interposed by the obstruction finding. Isabel's counsel could reasonably have concluded that so long as the obstruction finding stood, the court would refuse any reduction for acceptance of responsibility.

As the district court said, with such little likelihood of success in challenging the computations, counsel reasonably could have decided that it made more sense to seek a downward departure, as he did. Isabel concedes that counsel

argued "eloquently" for the downward departure. We affirm the district court's finding that Isabel received effective assistance of counsel at sentencing. See Barrett v. United States, 965 F.2d 1184, 1193 & n. 18 (1st Cir.1992) ("[W]e may not find a deficient professional performance in the constitutional sense unless the challenged decisions were not 'plausible options.' ") (citation omitted). Nor did the court err in failing to hold an evidentiary hearing on this issue, for Isabel has pointed to no material fact that has remained unresolved by the record. *66 See Ouellette v. United States, 862 F.2d 371, 377-78 (1st Cir.1988).

IV. RULE 32(c)(3)(D)

Finally, Isabel contends that the district court violated Fed.R.Crim.P. 32(c)(3)(D) by omitting to make findings on unresolved controverted issues posed by the pre-sentence report. We will assume arguendo that this issue may be considered. See United States v. Gattas, 862 F.2d 1432, 1433,

1434 & n. 4 (10th Cir.1988) (Section 2255 relief is available for Rule 32(c)(3)(D) violations where the failure to comply with the rule was not discovered until after the time for direct appeal and for a Rule 35 motion had expired). However, at the sentencing hearing the district court did resolve the only open factual issue presented to it, relating to the obstruction of justice issue. The court also recorded its finding on this issue in a memorandum issued after the sentencing hearing.

Rule 32(c)(3)(D) provides that the district court's resolution of disputed issues at sentencing shall be appended to the pre-sentence report made available to the Bureau. In his reply filed in this court, responding to the government's motion for summary affirmance, Isabel says (possibly for the first time) that the Bureau of Prisons has advised him that this memorandum of sentencing hearing is not in its records. The district court's disposition of the obstruction issue on remand

will presumably supersede its earlier finding, whether the court reaches its original conclusion or the opposite one. We assume that in due course the district court will transmit the record of its disposition to the Bureau of Prisons.

The district court's order denying Isabel's section 2255 motion is affirmed in part and remanded in part for further proceedings in accordance with this opinion.

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